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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ATLANTA GAS LIGHT COMPANY

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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List In Compliance With Rule 28.1

Atlanta Gas Light Company

QUESTION PRESENTED FOR REVIEW

Whether Congress intended to forbid pre-enforcement review of effective federal regulations under the Powerplant and Industrial Fuel Use Act of 1978.

PARTIES BELOW

Atlanta Gas Light Company
Laclede Gas Company
American Gas Association
Entex, Inc.
United States Department of Energy

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IN THE

Supreme Court of the United States

October Term, 1981

Atlanta Gas Light Company,

Petitioner,

v.

Department of Energy,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Atlanta Gas Light Company ("Atlanta Gas") petitions this Court for a writ of certiorari to review the February 1, 1982, decision of the United States Court of Appeals for the Eleventh Circuit in *Atlanta Gas Light Company, et al. v. Department of Energy,* Nos. 79-2568, *et al.*, dismissing, as not ripe for review, Atlanta Gas' challenge to federal regulations imposing prohibitions against providing natural gas service for use in outdoor lighting.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 666 F.2d 1359 and is reprinted in Appendix A.[1]

JURISDICTION

The court of appeals entered judgment on February 1, 1982, and denied a timely petition for rehearing and suggestion for rehearing *en banc* on March 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person ... shall ... be deprived of life, liberty, or property, without due process of law ....

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[1]The case below was briefed before the effective date of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (Oct. 14, 1980) and was originally argued before that court. However, after argument, the parties were notified by order of the court that Judge Thomas A. Clark had become aware that he was disqualified to sit in the case and that the case would be calendared for reargument before an entirely new panel. By the time of reargument, October 26, 1981, the Reorganization Act was in effect and the case was heard before a panel of the Eleventh Circuit. Because the first petition to review was filed by Atlanta Gas which resides and has its principal place of business in the Eleventh Circuit, it appears that that circuit would retain jurisdiction in the event of remand by this Court. FUA Section 702(c), 42 U.S.C. § 8412(c); 28 U.S.C. § 2112.

STATUTORY AND REGULATORY PROVISIONS

The statute upon which the court of appeals' decision is based is the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8302 *et seq.* (Supp. IV 1980) (the 'Fuel Use Act" or "FUA"). The regulations upheld by the court below are published at 10 C.F.R. §§ 516.10 *et seq.* (1981). Relevant portions of the statute and regulations are reprinted in Appendix B and Appendix C, respectively.[2]

STATEMENT OF THE CASE

The Fuel Use Act, one of five pieces of legislation encompassing the National Energy Act[3] establishes, through section 402, a federal program to restrict the use of natural gas in outdoor lighting. In the absence of a delegation to the States, the program is to be created, administered and enforced by the Secretary of Energy ("Secretary").

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[2]For ease of citation, all references to 42 U.S.C. relate to Supplement IV of the 1980 edition unless otherwise noted. Similarly, all references to 10 C.F.R. are to the 1981 version unless otherwise noted. The statute was amended by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981). The statute, as amended, appears in Appendix B to this Petition. The regulations were most recently amended at 47 Fed. Reg. 23,436-23,439 (1982) (to be codified at 10 C.F.R. Part 516). The regulations, as amended, appear in Appendix C to this Petition.

[3]The other four statutes are The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206; the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; and the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174.

Section 402(a), which prohibits the installation of outdoor gas lights by local distribution companies or direct industrial users, is the only element of the program actually created by statute.[4] The remainder of the program is to be created by rule.

Section 402(b) requires the Secretary to promulgate a rule prohibiting local distribution companies from providing natural gas service for use in outdoor lighting:

> Not later than 180 days after November 9, 1978, the Secretary shall, by rule, prohibit any local distribution company (unless an exemption has been obtained under subsection (c) of this section) from providing natural gas service for use in outdoor lighting.[5]

In furtherance of section 402(b), the Secretary promulgated a regulation prohibiting local distribution companies from providing natural gas service for use in outdoor lighting:

> (a) *Prohibition.* No local distribution company shall supply natural gas for use in any outdoor lighting fixture except for residential outdoor lighting fixtures, as that term is defined in § 516.11(i).[6]

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[4] 42 U.S.C. § 8372(a); App. B at 4.

[5] 52 U.S.C. § 8372(b); App. B at 5.

[6] 10 C.F.R. § 516.21(a); App. C at 6. The term "residential outdoor lighting fixture" is defined in § 516.11(i) as:

> a natural gas outdoor lighting fixture which was installed prior to, and was in service in connection with a residence on November 9, 1978.

The prohibition became effective on May 8, 1979, as to any light not in service on November 9, 1978;[7] on November 5, 1979, as to industrial and commercial lights in service on November 8, 1978; and on January 1, 1982, as to municipal lights in service on November 9, 1978.[8]

Section 402(c) requires the Secretary to issue orders exempting historical lights, memorial lights, and certain commercial lights from the prohibitions. Other exemptions are required to be granted upon a finding by the Secretary that an exemption is consistent with the public interest, is necessary to protect persons or property, or is necessary to permit the installation of substitute lighting.[9] Instead of promulgating regulations to establish procedures to implement the exemptions, the Secretary delegated to the state agencies this responsibility and authority, as well as his responsibility to enforce the prohibitions and his obligation to provide enforcement guidelines.[10] According to the

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[7]Residential lights in service on November 9, 1978, are excluded by statute from the prohibition against service. 42 U.S.C. § 8372(b), as amended; App. B at 5.

[8]10 C.F.R. §§ 626.21; App. C at 6.

[9]42 U.S.C. § 8372(c); App. B at 7.

[10]Congress had instructed the Secretary:

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [sic] side of the meter, and are not visible from the street may present problems to a company enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. *The Secretary should provide some guidance.*

H.R. Rep. No. 95-1749, 95th Cong., 2d Sess. 89, *reprinted in* [1978] U.S. Code Cong. & Ad. News 8760, 8782 (emphasis added).

Secretary's regulations, the delegation became effective on May 8, 1979.[11]

Contrary to the Eleventh Circuit's analysis, the Secretary did not delegate *all* of his responsibility and authority to the state agencies. This is evident from the Secretary's regulations. The prohibition against service is clear, unequivocal, and results from the regulations of the Secretary, not the States. The Secretary's regulations delegating his remaining authority to the state agencies also leave no doubt that the prohibition is intended to remain in effect whether or not the States implement the remainder of the program. That the authority to eliminate the prohibitions was not delegated to the state agencies is clear from the Secretary's regulations:

> The authorities and responsibilities delegated by this rule to the appropriate State regulatory authorities *are those enumerated in paragraphs (a) through (h) of this section.*[12]

As can be seen by paragraphs (b)-(f) of those regulations, the Secretary delegated numerous functions to the state agencies but the prohibitions were neither repealed nor their effectiveness stayed:

> (b) *Authority to issue orders.* The authority to issue orders exempting certain natural gas outdoor lighting fixtures *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities. . . .
>
> * * *
>
> (c) *Authority to establish exemption criteria.* The authority to establish criteria to be used in making

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[11] 10 C.F.R. § 516.30; App. C at 7.

[12] *Id.*

any determinations to issue any orders relating to exemptions *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

* * *

(d) *Authority to establish exemption procedures.* The authority to establish procedures for the acceptance, processing, consideration, and grant or denial of applications and requests for exemptions *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

(e) *Authority to establish enforcement mechanisms.* The authority to establish enforcement policies, criteria and procedures with respect to *the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

(f) *Authority to enforce prohibitions and assess civil penalties.* The authority to enforce the *prohibitions set forth in Subpart B of the rule,* including the authority to assess civil penalties for noncompliance with such prohibitions ... is delegated to the appropriate State regulatory authorities.[13]

* * *

Violations of either the statute or the regulations are punishable by civil fines of up to five hundred dollars per light which may be levied against local distribution

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[13]10 C.F.R. § 516.30(b)-(f)(1981) (emphasis added); App. C at 7--8.

companies or their corporate officers.[14] Additionally, injunctive relief against violations of the statute or its regulations may be sought by the Secretary against any person.[15]

Atlanta Gas argued below that because the Secretary bifurcated the Congressionally-directed program into two segments--(1) prohibitions and (2) exemptions, enforcement, and compliance guidelines--and implemented only the prohibitions, Atlanta Gas was denied due process of law by being subjected to a federal program that was vague and unworkable. Whereas Congress intended that the prohibitions be tempered by mandatory and discretionary exemptions as well as enforcement guidelines, the Secretary promulgated a blanket prohibition against providing natural gas service for use in outdoor lighting.

The Eleventh Circuit dismissed the case, holding that Atlanta Gas' claim was not ripe for review.

REASON FOR GRANTING THE WRIT

The Court should grant the petition for certiorari for the following reason:

The Eleventh Circuit's dismissal of Petitioner's challenge to the federal prohibitions as not ripe for review is in direct conflict with *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

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[14] 42 U.S.C. § 8431; App. B at 10.

[15] 41 U.S.C. § 8434; App. B at 12.

ARGUMENT

Abbott Laboratories v. Gardner Requires Reversal Of The Decision Below

Atlanta Gas sought review of the Secretary's regulations to obtain a determination that without the Congressionally-mandated exemptions and the Congressionally-directed compliance guidelines the federal program denied Atlanta Gas due process of law.

The court below dismissed Atlanta Gas' challenge as not ripe for review on the ground that all authority to promulgate regulations to implement and enforce section 402 had been delegated to the States. As the court stated:

> [T]he Secretary of Energy has delegated to the states his *entire* authority under the Fuel Use Act. *See* 10 C.F.R. § 516.30 (1981). [16]

The court then concluded that because there was no challenge by Altanta Gas to any state regulations, the challenge was premature:

> There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has nor will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule .... The contingent nature of the petitioners' due process claim is of a sort that courts have in the past avoided until another day .... So shall we today.[17]

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[16] 666 F.2d at 1369; App. A at 23 (emphasis added).

[17] 666 F.2d at 1370; App. A at 25.

These quotations from the opinion below make it abundantly clear that the court viewed the delegation as a relinquishment by the Secretary of all of his power under the statute to the States. Thus, as the court below saw it, absent a rescission of the delegation by the Secretary, the Secretary was powerless to act, having delegated all of his authority to the States. That this assumption was incorrect is now obvious. Whereas prior to the court's decision the Secretary remained silent to the meaning of his regulations, since the decision below issued, the Secretary has conceded that he retains the authority and responsibility "to administer all aspects of the natural gas outdoor lighting program when the appropriate State regulatory authorities have not accepted the delegation or when the delegation has been rescinded purusant to 10 C.F.R. § 516.32."[18] There is no evidence in the record that all of the States have accepted the delegation, indeed the record below is clear that the State of Texas specifically refused to accept the delegation. Yet, the Secretary refused to promulgate the guidelines requested, advising the parties below that such responsibility had been delegated to the States.

Thus, Atlanta Gas' claim is not contingent. The Secretary's prohibition is in effect today and could result in the assessment of fines and penalties against Atlanta Gas and its corporate officers. The challenge is to effective and enforceable federal regulations establishing a prohibition, violations of which are punishable by civil fines. The case is ripe for review.

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[18] 47 Fed. Reg. 23436, 23437 (May 28, 1982).

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1966) the Court identified three factors that would have to be present before pre-enforcement review of federal regulations would be barred: (1) the underlying statute must specifically preclude pre-enforcement review; (2) the issues must not be fit for judicial review; and (3) the challenged agency action must have no direct or immediate impact on the challenging parties. None of these factors is present in this case. Yet, in its first published pre-enforcement review case, the Eleventh Circuit has departed from these standards and denied Atlanta Gas a forum in which to obtain review of effective federal regulations.

A. The Act Specifically Authorizes Pre-Enforcement Review of the Regulations

Section 702 of the Act specifically provides for judicial review by any aggrieved person of any final rule of the Secretary "imposing a prohibition".[19] No party has ever disputed that the Secretary's regulation creating a general prohibition against providing natural gas service to a customer who uses such gas for outdoor lighting is a final rule which operates directly on Atlanta Gas. As acknowledged by the court below:

> [T]he Fuel Use Act regulations promulgated by the Secretary of Energy are directed not to the "States as States", but rather to the wholly private natural gas distribution industry. *They prohibit actions taken by private gas companies.*[20]

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[19] 42 U.S.C. § 8421(a), (c); App. B at 9.

[20] 666 F.2d at 1368; App. A at 21. Atlanta Gas is a local distribution company within the meaning of FUA § 402(g)(3), 42 U.S.C. § 8472(g)(3); App. B at 9.

A person is aggrieved by the final rule of the Secretary if he has suffered an injury to an interest arguably within the zone of interests to be protected or regulated by the agency under the applicable statute. *Sierra Club v. Morton,* 405 U.S. 727, 733 (1972) *citing Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970) and *Barlow v. Collins,* 397 U.S. 159, 163-164 (1970). Applying this test, it is clear that Atlanta Gas is aggrieved.

The Secretary's failure to promulgate regulations providing compliance guidelines, while leaving the regulatory prohibitions in effect, creates a serious dilemna for local distribution companies. Congress recognized that without the exemptions or the compliance guidelines the prohibitions would be excessive and unworkable. As the conferees instructed the Secretary:

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [sic] side of the meter, and are not visible from the street may present problems to a company enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. *The Secretary should provide some guidance.*[21]

Because all of the States have not acted under the "delegation" and promulgated enforcement guidelines, the unqualified federal prohibition has been left in place. Local distribution companies, therefore, are confronted with the unacceptable option

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[21]See note 10, *supra.*

of carrying out their common law and state law duties as public utilities while risking violations of the federal law, or disregarding those legal obligations in an effort to comply with the federal prohibitions.

A brief description of the manner in which natural gas service is provided to residential customers provides the background against which the dilemna can be explained.

Natural gas service generally is provided to individual residences through a single service line stemming from a gas main (a larger pipe which may provide natural gas to thousands of service lines). Service lines typically run under private property through easements granted to the local distribution company to its gas meter. Thereafter, gas is distributed to gas lights, as well as other appliances, through the customer's fuel line on the customer's side of the meter.

Most gas utilities do not sell or install outdoor gas lights and have not done so for years. New lights can be installed without the knowledge of the company, it being perfectly legal for anyone other than a local distribution company to install a new outdoor natural gas light and connect it to the customer's side of the meter. For this reason, and because most gas lights are not separately metered, there is no way for Atlanta Gas to determine which customers own gas lights without a complete survey of every customer in the service area. And, even if each residential gas light could be located, there is no way, absent complete cooperation from its customers, for Atlanta Gas to determine whether the light is exempt because it was installed and in use on November 9, 1978. Because use is not prohibited and the prohibition against service operates only against the

gas company, the customer is under no compulsion to accurately represent to the gas company the date of installation nor the date of use of the gas light.

In order to stop supplying natural gas for use in outdoor lighting, service must be terminated either at the lighting fixture (on private property) or at the point where the service line joins the gas main underground near the curb (on public property). Absent permission from the customer to enter on his property to disconnect the gas light at the lighting fixture, service would have to be disconnected at the gas main. This would result in discontinuing natural gas service to the entire residence, not just to the gas light. No authority exists under section 402 of the Fuel Use Act to discontinue gas service to an entire residence whether or not the owner uses natural gas in his outdoor gas light, any more than authority exists to discontinue gas service to a home because of an inefficient gas stove or hot water heater.

If Atlanta Gas were to discontinue service to a household using an exempt light, it could be sued in damages for an injury sustained to persons or property during the period of discontinuance,[22] face complaint proceedings before the Georgia Public Service Commission ("Georgia P.S.C.") for violating its tariff and the rules and regulations of the Georgia P.S.C., and possibly lose its franchise. On the other hand, if Atlanta Gas were to continue service and the light is not exempt, the company and its officers could face penalties and fines under section 723(c).[23]

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[22]Lawrence v. Atlanta Gas Light Company, 49 Ga. App. 444, 176 S.E. 75 (1934); Elwell v. Atlanta Gas Light Company, 51 Ga. App. 919, 181 S.E. 599 (1935).

[23]42 U.S.C. § 8433(c); App. B at 11.

Altanta Gas faces a real and serious problem created by the Secretary's failure to carry out his full responsibility under the statute. Without compliance guidelines, Atlanta Gas faces serious questions of whether to undertake the extreme measures required by the federal regulations and terminate all gas service to customers who have outdoor gas lights, or continue to carry out its duty as a public utility and provide continuous and reliable gas service, risking federal fines and penalties. The prohibitions were not stayed pending the promulgation of appropriate regulations by state authorities. They are in effect and compliance is demanded.

As a person directly and adversely affected by the Secretary's final rule prohibiting service for use in outdoor gas lights, Atlanta Gas is *specifically* authorized by statute to bring a review proceeding. To suggest that the Secretary's "delegation" to the States somehow bars Atlanta Gas from pre-enforcement review of the Secretary's regulations is to deny the existence of the prohibition and its direct operation on Atlanta Gas.

B. The Issue Presented Is Purely Legal

The question presented by this case is purely legal. The Secretary's action in making the prohibitions immediately effective without promulgating similarly effective regulations providing enforcement guidelines raises the purely legal issue of whether the Secretary's action denies Atlanta Gas due process of law.

The Secretary has made it clear that enforcement guidelines will not be forthcoming. The adjudication of the Secretary's obligation to complete the federal program will neither entangle the courts in abstract

disagreements over administrative policies nor will it result in judicial interference in administrative decision-making. The regulatory prohibitions in issue are final, having been promulgated after notice in the Federal Register and the consideration of comments. The rule is neither informal nor tentative and was not the ruling of a subordinate official. It is in effect and there is no question but that compliance is expected. Violations carry fines and penalties which can be levied against the companies or their corporate officials.

C. The Impact On Atlanta Gas Is Immediate and Direct

The regulations create an effective prohibition against providing natural gas service to certain categories of non-exempt customers without providing a means for determining which customers are exempt or a mechanism for reasonable enforcement. In order to carry out its duties and responsibilities as a public utility, Atlanta Gas is faced with the unacceptable choice of providing natural gas service to its customers at the risk of prosecution for serving gas that may well be used in non-exempt outdoor lights or complying with federal law and run the risk of violating non-preempted state laws.

CONCLUSION

No basis exists for denying Atlanta Gas its right to judicial review of the Secretary's effective federal regulations under section 402 of the Fuel Use Act. Accordingly, because the Eleventh Circuit's decision directly conflicts with this Court's decision in *Abbott Laboratories v. Gardner*, a writ of certiorari should issue to review the judgment and the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A
OPINION BELOW

ATLANTA GAS LIGHT COMPANY,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, Respondent.

ENTEX, INC., *Petitioner,*
v.
U.S. DEPARTMENT OF ENERGY, ECONOMIC REGULATORY ADMINISTRATION, *Respondent.*

LACLEDE GAS COMPANY,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, *Respondent.*

AMERICAN GAS ASSOCIATION,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, *Respondent.*

Nos. 79-2568, 79-3237, 80-1573, 80-7491 and 80-7528.

United States Court of Appeals, Eleventh Circuit.

Feb. 1, 1982.

On petitions for review of orders of the United States Department of Energy, Economic Regulatory Administration, the Court of Appeals, Tuttle, Circuit

Judge, held that, in a preenforcement context, the Fuel Use Act and its regulations could not be held to be unconstitutional as violating due process clause of Fifth Amendment or as exceeding limits of constitutional congressional authority as embodied in both the commerce clause and Tenth Amendment.

Dismissed.

1. War and National Emergency

Under provision of Powerplant and Industrial Fuel Use Act of 1978 court's jurisdiction to review is prescribed by requirements set out in Administrative Procedure Act; such requirements include all general standing limitations to federal court jurisdiction. Powerplant and Industrial Fuel Use Act of 1978, §§ 402, 402(b)(1), (d), (e)(2), 702(c), (c)(2), 721, 723 as amended 42 U.S.C.A. §§ 8372, 8372(b)(1), (d), (e)(2), 8412(c), (c)(2), 8431, 8433; 5 U.S.C.A. § 702.

2. Federal Courts

Where no injury had yet occurred but it was alleged that injury would occur in future and where commerce clause challenge was unlikely to change in substance or in clarity by virtue of actual prosecution and where petitioners in case at bar were and would continue to be most appropriate parties to raise commerce clause objection against Fuel Use Act, court would adjudicate merits of commerce clause dispute before it. Power plant and Industrial Fuel Use Act of 178, § 402 as amended 42 U.S.C.A. § 8372; U.S.C.A. Const. Art. 1, § 8, cl. 3.

3. Commerce

Constitutionally prescribed inquiry in commerce clause challenge involving traditionally local activities necessitates at outset examination of effects of regulated activity on interstate commerce, and if such effects are wholly lacking, then federal law in question must be held unconstitutional, but court must also

assess rationality of congressional judgement in passing act, by inquiring whether there is rational activity and whether means chosen are reasonably adapted to achieve intended legitimate goals. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Commerce

Fact that regulated conduct is wholly local activity does not necessarily lead to finding that Congress overstepped its powers under commerce clause. U.S.C.A. Const. Art. 1, § 8, cl.3.

5. Commerce
War and National Emergency

Though distribution of natural gas for outdoor lighting purposes is local activity, in sense that physical starting and ending points are geographically situated within borders of single state, there was rational basis for Congress' determination that interstate commerce was indeed affected by such regulated activity and, to protect against nationwide effects on interstate commerce, Congress could pass laws regulating distribution of natural gas. Powerplant and Industrial Fuel Use Act of 1978, §§ 102 et seq., 102(b), 201, 301, 402, 402(a), (b)(1) as amended 42 U.S.C.A. §§ 8301 et seq., 8301(b), 8311, 8341, 8372, 8372(a), (b)(1); U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Federal Civil Procedure

In view of the fact that injury in fact existed or was likely to occur in case at bar, and where case was not taxpayer suit, petitioners had standing to assert Tenth Amendment challenge to Fuel Use Act and regulations. Powerplants and Industrial Fuel Use Act of 1978, § 8301 et seq.; U.S.C.A. Const. amend. 10.

7. States
War and National Emergency

That Fuel Use Act regulations promulgated by Secretary of Energy preempted state regulations

contrary to or inconsistent with their contents did not implicate Tenth Amendment, and where although Secretary of Energy had delegated his powers under Act that states remained free to reject delegation and thereby refuse to implement Act, under terms of Act and regulations Secretary could do nothing more than rescind delegation, Act was not violative of Tenth Amendment. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.; U.S.C.A. Const. Amend. 10.

8. War and National Emergency

Congress and Department of Energy clearly intended that states be primary regulators under the Fuel Use Act. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.

9. Constitutional Law

Where petitioners in case at bar challenged, on due process grounds, only federal statute and implementing regulations, making no claim whatsoever regarding vagueness of particular state's regulatory program, and it was not clear which states would promulgate regulations under Act nor even which had accepted delegation of powers by Secretary of Energy, issue whether Fuel Use Act was unconstitutionally vague under due process clause of Fifth Amendment was not yet ripe for adjudication. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.; U.S.C.A. Const. Amend. 5.

Petitions for Review of Orders of the U.S. Department of Energy, the Economic Regulatory Administration.

Before TUTTLE, HATCHETT and ANDERSON, Circuit Judges:

TUTTLE, Circuit Judge:

This case arises out of a pre-enforcement challenge to the constitutionality of several provisions of the Power Plant and Industrial Fuel Use Act of 1978 (Fuel Use Act or Act), 42 U.S.C.A. § 8301, *et seq.* (1981), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981). Additionally the petitioners attack the constitutionality of the regulations promulgated by the Secretary of Energy pursuant to the Fuel Use Act. In this appeal we consider whether the statute and its accompanying regulations violate the Due Process Clause of the Fifth Amendment, and whether Congress, in passing the Act, exceeded the limits of its constitutional authority as embodied in both the Commerce Clause and the Tenth Amendment. We conclude that in a pre-enforcement context such as the one presented here, the Act and its regulations cannot be held to be unconstitutional.

I.

A.

On November 9, 1978, the President signed into law five bills in a comprehensive attempt to improve our nation's energy situation. The Fuel Use Act, the subject of controversy in the present case, is one of the acts in this legislative package.[1]

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[1]The other four acts are the National Energy Conservation Policy *Act, 42 U.S.C.A.* §§ 8201—8286(b) (1981); the Energy Tax Act, 92 Stat. 3174 (codified in scattered sections of Title 26 of the U.S. Code); the Natural Gas Policy Act, 15 U.S.C.A. §§ 3301—3432 (1981); and the Public Utility Regulatory Policies Act, 15 U.S.C.A. §§ 2601-2645 (1981).

The purposes of the Fuel Use Act are, *inter alia*, to conserve natural gas for industrial uses for which there are no alternative fuels; to insure that adequate supplies of natural gas are available for certain essential agricultural uses; and, to reduce the vulnerability of the United States to energy supply interruptions. 42 U.S.C.A. § 8301(b) (1981). The predominant means of effectuating these goals are the Act's prohibitions on the use of natural gas or petroleum as a primary energy source in any new electric powerplant or major fuel burning installations, and the Act's requirement that existing powerplants convert to coal or other alternative fuels by January 1, 1990. 42 U.S.C.A. §§ 8311, 8341 (1981). In addition, the Act restricts the use of natural gas in outdoor lighting. 42 U.S.C.A. § 8372 (1981). This latter provision regulating outdoor lighting is the focus of the present appeal.

Section 402 of the Act instructs the Secretary of the Department of Energy to issue a rule prohibiting local gas distribution companies both from providing natural gas for use in outdoor lighting, 42 U.S.C.A. § 8372(b)(1), and from installing any outdoor lighting fixtures using natural gas. 42 U.S.C.A. § 8372(a).[2] Violators of Section

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[2]More precisely, the prohibitions in § 402 detail several schedules of effective dates depending on: (1) whether the customer is an industrial or residential user; (2) whether the gas company was distributing to a particular customer for gaslighting purposes on November 9, 1978; and, (3) whether the gas is being used in a municipal outdoor lighting fixture. See 42 U.S. C.A. § 8372 (1981). These scheduling differences are not relevant to the issues before the Court in this case.

Additionally, the 1981 amendments to the Act substantially alter the extent and timing of prohibition with respect to gas that is distributed to residential customers.

To avoid confusion, in this opinion discussions of the provisions of the Fuel Use Act will employ section numbers from the public law, whereas citations to the Act will refer to section numbers in the official codification.

402(b)(1) are subject to a fine not to exceed $500 for each outdoor lighting fixture involved. 42 U.S.C.A. § 8433 (1981).

[1] The Secretary of Energy is charged with primary responsibility for administering and enforcing the Act, and is authorized to promulgate regulations to that end. 42 U.S.C.A. §§ 8372(d), 8431 (1981). In addition, the Secretary may delegate to the appropriate regulatory authority of the States all authorities and responsibilities regarding outdoor lighting under Section 402.[3] Persons aggrieved by any final rule or order promulgated by the Secretary under the Act are granted a statutory right to file a petition for review in the United States Court of Appeals for the circuit wherein the person resides or has his or her principal place of business. 42 U.S.C.A. § 8412(c) (1981).[4]

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[3]The delegation provision reads:

> "(e) Authority may be delgated to the States—
> (1) Under regulations prescribed by the Secretary, the responsibility and authority of the Secretary with regard to outdoor lighting under this section may be delegated to the appropriate regulatory authority of a State if he determines that such delegation would be consistent with the purposes of this section."

42 U.S.C.A. § 8372(e)(1) (1981). Section 402(e)(2) empowers the Secretary to rescind this delegation "at any time by notifying the State authority of such rescission." 42 U.S.C.A. § 8372(e)(2) (1981).

[4]The statute aditionally provides that whenever such a petition is filed, the court's jurisdiction to review is prescribed by the requirements set out in the Administrative Procedure Act. 42 U.S.C. § 8412(c)(2) (1981). See 5 U.S.C.A. § 702 (1977). These requirements include all general standing limitations to federal court jurisdiction. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The regulations dealing with outdoor gaslighting were published on May 10, 1979, *see* 44 Fed. Reg. 27606 (1979), and amended on May 23, 1980. 45 Fed. Reg. 35206 (1980), later codified at 10 CFR §§ 516.10—.47 (1981). In these regulations, the Secretary issued a rule prohibiting installation of gaslights and distribution of gas for use in such lights in accordance with the explicit mandate of Section 402. In addition, the Secretary delegated his authorities and responsibilities to the appropriate state regulatory authority as permitted by the Act. Finally, the Secretary promulgated regulations authorizing the Department of Energy to rescind this delegation if it is found that a State has failed to comply with the Act or the regulations. *See* 10 CFR 516.30—.32 (1981).

In August of 1981 Congress passed the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, 95 Stat. 617 (1981). Section 1024 of this Act amends the Fuel Use Act by eliminating the prohibition on distribution of natural gas to residential users for outdoor lighting purposes in fixtures that were in use before November 9, 1978. These amendments also require local gas distribution companies to inform their customers about the amount and cost of natural gas used in outdoor lighting, and to report to the Secretary on their methods of dispersing such information.[5] Implementing regulations for these amendments have not yet been published.

B.

On July 2, 1979, Atlanta Gas Company (Atlanta Gas) petitioned this Court for review of the Fuel Use Act

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[5]For reasons that will become clear later in this opinion, these amendments do not affect the outcome of this case. Petitioners' claims that the amendments present additional vagueness problems is not persuasive in light of our holding that a due process challenge to the Act is not ripe at this time. See Slip op. p. 320, p. ____ *infra*.

regulations published in May, 1979. Petitioners Laclede Gas Company (Laclede) and the American Gas Association (A.G.A.) filed briefs *amicus curiae*. On January 24, 1980, this Court stayed further proceedings at the request of the government pending further rulemaking by the Secretary. After the Secretary published the amended regulations in May of 1980, Atlanta Gas filed and was granted a motion to amend its original petition to incorporate the amendments to the regulations. At that time this Court also consolidated various petitions for review filed in other circuit courts of appeals by Laclede, A.G.A., and Entex, Inc.[6] Because the petitioners have appealed directly to this Court from the rules issued by the Secretary of Energy, there is no record of findings or conclusions of law established by a lower tribunal.

II.

[2] Petitioners initially raise a facial attack on Section 402 of the statute and the accompanying regulations, on the ground that the prohibitions contained therein exceed the scope of congressional power under the Commerce Clause of the Federal Constitution.[7] They make three objections to the constitutionality of the Act

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[6]Laclede Gas Company's petition for review, filed in the United States Court of Appeals for the Eighth Circuit, was transferred to this Court, docketed as No. 80-7941, and consolidated with this proceeding by order of the Court issued on July 9, 1980. Entex, Inc.'s petition for review was filed with this Court, docketed as No. 80-1573, and consolidated with this proceeding on June 24, 1980. The American Gas Association's petition for review, filed in the United States Court of Appeals for the Fourth Circuit, was transferred to this Court, docketed as No. 80-7528 and consolidated with this proceeding on July 17, 1980.

[7]The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. 1, § 8, cl. 3.

We would admit at the outset some hesitancy in even entertaining jurisdiction to hear the merits of the Commerce

under the Commerce Clause. First, petitioners note that regulation of the distribution of natural gas has been a subject of purely local concern historically left within the purview of state or municipal regulatory authority. In support, they rely on several relatively old cases in which the United Stated Supreme Court declared that in the area of natural gas distribution, interstate commerce ends when the gas passes into the local mains of private distribution companies. *See, e.g., East Ohio Co. v. Tax Comm'n* 283 U.S. 465, 470—72, 51 S. Ct. 499, 500—01, 75 L.Ed. 1171 (1931); *Public Utilities Comm'n v. Landon*, 249 U.S. 236, 245, 39 S.Ct. 268, 269, 63 L.Ed. 577 (1919). Second, the petitioners argue that Congress had no rational basis for finding that the activity of distributing gas for outdoor lighting purposes affects interstate commmerce.

Clause challenge. As previously noted the suit is a pre-enforcement challenge. The petitioners in this case have not been prosecuted for violating any of the statutory provisions or regulations. Indeed no person has been so prosecuted, as the Act has yet to be enforced. Moreover, it is unclear at this time whether civil penalties for ongoing violations will be assessed whenever the Act is enforced. The speculative and contingent nature of petitioners' future economic injury makes this case of a kind that courts have in the past treated as unripe for adjudication. *See, e.g., United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90, 67 S.Ct. 556, 564—65, 91 L.Ed. 754 (1947) ("A hypothetical threat is not enough.") Nor does the tenuousness of the injury end there. The states, if they accept the Secretary's delegation, have full power to administer and enforce the Act. Presumably one state could decide to enforce the Act retroactively, whereas another could within its terms grant immunity to all past violators up to the day the state enforcement regulations are promulgated. No evidence has been submitted by any party suggesting how any of the states plan to initiate enforcement of the Act. That the petitioners come from different states makes it all the more unclear the precise nature and extent of the injury with which we are dealing under the Commerce Clause challenge.

Nevertheless, although the injury has not yet occurred but is merely one that the petitions allege will occur in the future, this is not dispositive of the standing or ripeness issue. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 555, 593, 43 S.Ct. 658, 659, 663-64, 67 L.Ed.

Finally, they assert that the means chosen by Congress under the Fuel Use Act is not reasonably adapted to the ends set out in the first section of the Act, namely, to conserve natural gas and to protect industries whose only viable source of power is natural gas.

[3] We agree with the petitioners' framing of the relevant issues in a constitutional attack upon federal legislation based upon the Commerce Clause. The constitutionally prescribed inquiry in a Commerce Clause challenge involving traditionally local activities necessitates at the outset and examination of the effects of the regulated activity on interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 121, 61 S.Ct. 451, 460, 85 L.Ed. 609 (1941). If such effects are wholly lacking, then the federal law in question must be held

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1117 (1923) ("[o]ne does not have to await the consummation of a threatened injury to obtain preventative relief.") Moreover, in the present case, the Commerce Clause challenge is unlikely to change in substance or in clarity by virture of an actual prosecution. Thus another of the values inherent in the ripeness doctrine, namely, the need for a concrete presentation of the issues, would not be served by awaiting enforcement. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681 (1967). Finally, the petitioners, in this case are now, and will in the future continue to be the most appropriate parties to raise the Commerce Clause objection. The Fuel Use Act, in its minimal prohibitive capacity, operates against local gas distribution companies. The petitioners are the entities against whom fines will be levied for noncompliance, if and when the Act is enforced.

In any event, this case is quite similar to two recent Supreme Court decisions in which the Court heard and determined the merits of a pre-enforcement, Commerce Clause challenge to other federal statutes and regulations. *See Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Hodel v. Indiana*, _____ U.S. _____, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981). Neither of these opinions mentions any standing problems, and so we view them as adequate precedent for our decision to adjudicate the merits of the Commerce Clause dispute before us.

unconstitutional. Additionally the Court must assess the rationality of the congressional judgment in passing the Act. This involved an inquiry into: (1) whether there is a rational basis for Congress' determination that interstate commerce is indeed affected by the regulated activity; and, (2) whether the means chosen are reasonably adapted to achieve the intended legitimate goal. *Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981).

[4] Nevertheless, we differ with the petitioners on the appropriate result that follows from this inquiry. The mere fact that an admitted local or intrastate activity such as the distribution of natural gas to local customers is affected by federal regulation does not automatically lead to a judgment that Congress has overstepped its powers under the Commerce Clause. As the Court said in *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L.Ed. 609 (1941), "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id. at 118, 61 S.Ct. at 459.[8] Numerous other

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[8]We recognize that the quoted language in *Darby* may present a problem of circular reasoning with respect to the question, "Which intrastate activities are an appropriate subject of the federal power to regulate interstate commerce?" Nevertheless, the *Darby* case at least establishes that the fact that the regulated conduct in this case is a wholly local activity does not necessarily lead to a finding that Congress has overstepped its powers under the Commerce Clause. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 569, 59 S.Ct. 993, 1011, 83 L.Ed. 1446 (1939) ("Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.")

cases make it clear that the federal government may pass legislation to foster and protect the flow of interstate commerce even though the regulated activity may be purely local in character. Thus in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), the Court upheld federal legislation setting quotas on the production of wheat even though the regulations interfered with the wholly local pursuit of growing wheat for personal consumption. These cases require that the courts view the regulated activity in the context of the nationwide movement of commerce to determine whether there exists significant effects on interstate commerce.

[5] In the present case, such effects are beyond dispute. It is of course true that the distribution of natural gas for outdoor lighting purposes is a local activity in the sense that its physical starting and ending points are geographically situated within the borders of a single state. But to so view the activity is to extract it from its place in interstate commerce and thus ignore its substantial ramifications for, and effects upon, such commerce. Local gas companies distribute natural gas to a variety of customers for a variety of uses. And a significant amount of gas is used to heat the office buildings of countless corporations, most of which are engaged in interstate, if not international, commerce. Decisions concerning the local distribution of natural gas thus directly affect the flow of interstate commerce. More importantly, as natural gas becomes more scarce, the reverberative adverse effects of decisions to supply non-necessary uses such as outdoor decorative lights will be felt with increasing alarm in the commercial community. Even if such effects seem minor in the context of one local gas company and its clientele, the combined effect of distribution decisions being made by companies all over the nation is substantial. *See Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82,

90–91, 87 L.Ed. 122 (1942). To protect against these nationwide effects on interstate commerce, Congress may pass laws that impinge on intrastate activities. *See United States v. Darby, supra*, 312 U.S. at 114, 61 S.Ct. at 457.

Petitioners' citation to several relatively old United States Supreme Court cases does not persuade us to take a different view. *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950); *East Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171 (1931); *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927); *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1924); *Public Utilities Comm'n For the State of Kansas v. Landon*, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577 (1919). In these cases the Court characterized the activity of distributing natural gas a purely local affair. They are nevertheless distinguishable from the present case in two significant respects. First and most importantly, the cases involved only state regulation of local gas distribution companies and thus the question of the extent of federal commerce power was not before the Court.[9] The issue presented in each case was whether the activity of distributing natural gas should be characterized as interstate commerce for purposes of determining whether the disputed state regulations improperly interfered with the flow of such

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[9]In point of fact one of the cases cited dealt with federal regulations. In *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950), the Court upheld the extension of federal regulatory power over a gas company that transported natural gas through interstate pipelines for local distribution. That case can only support the principles set out in this opinion.

commerce.[10] In that context, the Court declared the regulations permissible, holding that the interstate aspect of natural gas commerce terminated at the local mains. *E.g., Public Utilities Comm'n v. Landon*, 249 U.S. 236, 245, 39 S.Ct. 268, 269, 63 L.Ed. 577 (1919). The cases thus serve merely to delineate the extent of the flow of interstate commerce, and do not purport to define the extent of Congress' power to regulate activities affecting such commerce.[11] And we have already established that Congress' power to regulate commerce is not restricted to the regulation of only interstate commerce. See Slip op. p. 315, p. _____ *supra*. The fact that the Supreme Court has characterized gas distribution as a local activity is thus in no way determinative of the Commerce Clause issue before us today.

Secondly, the Court's characterization of gas distribution as a purely local activity must be squared with more recent cases firmly establishing that the activity involved in this case is one in interstate commerce. In *Katzenbach v. McClung*, 79 U.S. 294, 85 S.Ct. 377, 13 L.Ed2d 290 (1964), the Court upheld the power of Congress to prohibit racial discrimination in any restaurant serving food that has been shipped in interstate commerce. *Id.* at 304, 85 S.Ct. at 383-384. No

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[10]Since the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 13 L.Ed 996 (1851), the Supreme Court has recognized a limitation on State authority to regulate activities in interstate commerce. These limitations arise by negative implication from the Constitution's express grant of power to the federal government to regulate interstate commerce, as well as from considerations of federalism that emanate from the system of government set up in the Constitution. See L. Tribe, American Constitutional Law 320-326 (1978).

[11]See *Katzenbach v. McClung*, 379 U.S. 294, 302, 85 S.Ct. 377, 383, 13 L.Ed.2d 290 (1964) (line of cases holding that interstate commerce ends when goods come to rest in state of destination applies to state regulation but not to federal regulation).

party to the present case denies that much of the natural gas supplied to local customers in one state has been piped from another state. This fact by itself is sufficient after *Katzenbach* to justify our understanding of the activity of gas distribution as one in interstate commerce.

With these points made we are left with the determination whether Congress acted rationally in adopting the Fuel Use Act. In short we believe Congress did act rationally in seeking to regulate local gas distribution by means of this Act.

First, it is clear that Congress has a rational basis for determining that distributing gas for use in outdoor lights affects interstate commerce. Congress was aware that a constant supply of natural gas is critical to the continued operation of many commercial industries in our country. Congressman Dingell, who introduced Section 402 of the Act, cited a study in support of the statue demonstrating that seemingly minor steps toward conserving natural gas could be of great protective benefit to industries that rely on gas for ongoing operations. Transcript, Joint Conference on Energy, 95th Cong., 1st Sess. 2009-2011, 2033—2036 (1977). In that study the Commonwealth of Virginia found that the potential gas savings resulting from a prohibition on natural gas use in outdoor lighting in the state of Virginia was sufficient to sustain for several weeks the massive local operations of the Allied Chemical Corporation. In addition, Congressman Dingell cited statistics established by the Federal Energy Agency estimating that the potential savings of natural gas due to a nationwide discontinuance of service to all outdoor lights in this country would be between 36 and 73 billion cubic feet of gas per year. Transcript, Joint Conference on Energy at 2034.[12]

[12]Congressman Dingell noted that the value of such gas was, at that time, between 10 and 15 billion dollars. Transcript, Joint Conference on Energy at 2036.

Petitioners argue that the relatively small amount of gas savings that would result from the prohibitions in Section 402, namely, two-tenths of one percent of all natural gas consumed annually, undercuts any rational basis Congress may have had in determining that distribution for such consumption affects interstate commerce. We may quickly dismiss this argument in the light of the recent *Hodel* cases, wherein the Supreme Court explicitly declared that the volume of commerce affected is not the touchstone of the rationality test under the Commerce Clause. *See Hodel v. Indiana*, ____ U.S. ____, 101 S.Ct. 2376, 2383, 69 L.Ed.2d 40 (1981).

Second, we find that the prohibitions contained in Section 402 are reasonably adapted to the legitimate goal of protecting interstate commerce from the adverse effects of using natural gas for outdoor lighting purposes. The gas saving produced by the Act's prohibitions benefit commercial industries by helping to protect them from the threat of gas shortages in critical periods of the year. The fact that these savings represent only a small percentage of total gas consumption does not undercut our judgment of the rationality of the means employed in this case. In the first place, as just indicated the volume of commerce involved is not the appropriate focus in determining the rationality of the congressional action.[13] More

[13]Admittedly, the Court in *Hodel* rejected the "volume of commerce" standard only in its discussion of the first aspect of the rationality test, namely, whether Congress had any rational basis for finding that the regulated activity affected interstate commerce. *Hodel v. Indiana*, ____ U.S. ____, 101 S.Ct. 2376, 2383, 69 L.Ed.2d 40 (1981). We feel it logically appropriate, however, to likewise reject this standard under the second, "reasonable related" prong of the rationality test. The Court in *Hodel* found the congressional act constitutional. If the volume of commerce involved in that case had been problematic under the "reasonably adapted" prong of the test, then we suggest that the Court would have held the Act unconstitutional. In the alternative, the Court's holding can be viewed as having implicity determined that the volume was sufficient to satisfy the "unreasonably adapted" test.

importantly, the relatively small gas savings resulting from the Fuel Use Act must be considered as an integral part of a much broader federal reglatory program aimed at shifting our nation's energy consumption toward fuels that are more plentiful and accessible than natural gas. When Section 402 is viewed both in conjunction with the other provisions of the Fuel Use Act regulating fuel use by local power companies, *see* Slip op. p. 311, p. _____ *supra*, and with the four other bills enacted collectively with the Fuel Use Act to deal with the national energy situation, *see* note 1, *supra*, we find that Section 402 is a rational part of a larger regulatory scheme the whole of which is reasonably adapted to the legitimate ends set out in the first provisions of the Act.[14]

III.

[6, 7] The petitioners also argue that Section 402 and the regulations violate the Tenth Amendment.[15] They rely principally on the case of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), where the Supreme Court acknowledged that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." *Id.* at 842, 96

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[14]*Hodel v. Indiana*, _____ U.S. _____, S. Ct. 2376, 69 L.Ed. 2d 40 (1981) ("It is enought that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.") *Id.* 2385 n. 17. *See Maryland v Wirtz*, 392 U.S. 183, 197 n27, 88 S.Ct. 2017, 2024 n.27, 20 L.Ed.2d 1020 (1968).

[15]The Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend.10.

S.Ct. at 2470. We cannot agree with petitioners for the reasons that follow.[16]

The most recent Supreme Court discussion of these Tenth Amendment limitations can be found in the companion *Hodel* cases previously mentioned. In *Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the Court decided that the success of a claim that the exercise of congressional commerce power violates the holding in the *Usery* case depends on the satisfaction of each of three requirements. "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state soveriegnty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of

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[16]Just as in the Commerce Clause issue we must initially express our uncertainty about whether the petitioners have standing to raise the Tenth Amendment question. None of the petitioners are state or government officials of any kind. In *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the Supreme Court intimated under its nexus requirement that a private party could not have standing to assert the interests of the states as protected by the Tenth Amendment. Nevertheless, we grant standing in this case for two reasons. First, during the New Deal era the Supreme Court granted such standing by implication in considering the merits of the Tenth Amendment claims brought by private parties. *See Helvering v. Davis*, 301 U.S. 619, 637, 640, 57 S.Ct. 904, 907, 908, 81 L.Ed. 1307 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 573, 585, 57 S. Ct. 883, 884, 890, 81 L.Ed. 1279 (1937). Second, the Court in *Duke Power Co. v. Carolina Env. Study Gruop*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), expressly limited the nexus requirement contained in *Flast* to taxpayer suits. Since this is not a taxpayer suit, under *Duke Power* the petitioners may make constitutional objections based on any of its provisions so long as they show the requisite injury in fact and its causal relation to the action in question. Because we have already concluded that injury in fact exists or is likely to occur in this case, see note 7 *supra*, we find it necessary to reach the merits of the Tenth Amendment issue.

traditional functions.' " *Id.* at 2366. (Citations to *Usery* omitted.) In both *Hodel* cases, the Court held that the act in question [the Fair Labor Standards Act] did not satisfy the first requirement of regulating the states as states and thus did not violate the Tenth Amendment. *Id.; Hodel v. Indiana,* _____ U.S. _____, 101 S. Ct. 2376, 2386, 69 L.Ed.2d 40 (1981). For similar reasons, we also so hold.

In the first place, the Fuel Use Act regulations promulgated by the Secretary of Energy are directed not to the "States as States," but rather to the wholly private natural gas distribution industry. They prohibit actions taken by private gas companies. That they pre-empt state regulations contrary to or inconsistant with their contents does not implicate the Tenth Amendment. As the Court in *Usery* ruled:

> Congressional power over areas of private endeavour, even when its exercise may preempt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the ends permitted by the Constitution."

Id. 426 U.S. at 840, 96 S.Ct. at 2469 (quoting *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)). See *Hodel v. Virginia Surface Min. & Rec. Ass'n, supra* 101 S..Ct. at 2368 (1981) (Congress does not violate the Tenth Amendment simply because it acts in a way that displaces states' exercise of police powers).

It is true that the Secretary of Energy in accordance with his express statutory authorization has delegated his administrative and enforcement powers to the appropriate state regulatory authority. Petitioners interpret this delegation as a mandatory scheme whereby the states are forced to administer and enforce the regulatory prohibitions. As such they assert that the Tenth Amendment is implicated because it coercively appropriates state regulatory power to accomplish a federal regualtory objective. See *District of Columbia v. Train,* 521 F.2d 971, 990 (D.C.Cir. 1975).[17]

Whatever the force of their contention we do not consider it necessary to reach it in substance because we disagree with the petitioners' reading of the delegation provisions. Although the Secretary has delegated his powers under the Act, the states remain free to reject the delegation and thereby refuse to enforce the regulations. Should any state so refuse to implement the Act, under the terms of the Act and the regulations the Secretary can do nothing more than rescind the delegation. See 10 C.F.R. § 516.32 (1981). There is thus no

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[17] In *Hodel* the Court similarly indicated that Tenth Amendment problems might exist where a federal regulatory program requires the states to adopt implementing regulations. *Hodel v. Virginia Min. & Rec. Ass'n,* — U.S. — 101 S.Ct. 2352, 2366, 69 L.Ed2d 1 (1981). In that case the Court held that the federal statute gave the states a choice as to whether they or the federal government would administer and enforce the program and thus did not violate the Tenth Amendment.

element of coercion involved in the delegation. Just as in *Hodel*, the Act merely "establishes a program of cooperative federalism that allows the states within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Min. & Rec. Ass'n, supra* 101 S.Ct. at 2366 (1981). Such a regulatory scheme thus protects the states' interest in remaining free to "structure integral operations in areas of traditional governmental functions," *National League of Cities v. Usery, supra* 426 U.S. at 852, 96 S.Ct. at 2474, without running afoul of Tenth Amendment limitations.

IV.

The petitioners also urge this Court to hold the Fuel Use Act unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[18] Essentially the petitioners complain of substantial uncertainty as to how best to comply with the prohibitions in Section 402. We do not reach the merits of the petitioners' due process claim because the issue is not ripe for adjudication at this time.

As we have indicated previously, the Secretary of Energy has delegated to the states his entire authority under the Fuel Use Act. See 10 C.F.R. § 516.30 (1981). Under the terms of this delegation, the states have the authority to promulgate regulations, establish exemption procedures and criteria and issue exemption orders, and establish enforcement mechanisms and

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[18]That provision states in pertinent part: "No person shall ... be deprived of ... property without due process of law ...." U.S. Const. amend. V. The courts have interpreted this clause to require that statutes be reasonably clear so that persons of common intelligence do not have to guess at their meaning and differ as to their application. *Conally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

assess civil penalties. In large part then, the regulations grant to those states that accept the delegation broad powers to promulgate their own set of regulations and exemption criteria. Moreover the delegation provisions give the states substantial flexibility in promulgating these regulations. That the states possess such regulatory freedom under the Act has been an explicit intention of Congress and the Department of Energy from the beginning. As the Department explained in their introductory comment to the proposed rules published in the Federal Register, "We propose to exercise this option [to delegate to the states], noting that the congressional conferees, in their Explanatory Statement for the Act, explicitly encouraged DOE to do so. Enforcement of the statutory provisions of the Act constitutes a regulatory activity most appropriately conducted at the State level . . . Delegating authority to the appropriate state regulatory authorities, with minimum Federal guidance, will allow sensitivity to local conditions."

[8, 9] Congress and the Department of Energy clearly intended that the states be the primary regulators under the Fuel Use Act. Yet the petitioners in the present case challenge on due process grounds only the federal statute and implementing regulations, making no claim whatsoever regarding the vagueness of a particular state's regulatory program. At this time it is not clear which states have promulgated regulations under the Act, nor even which have accepted the Secretary's delegation.[19] Until the petitioners can show that there presently exists a set of regulations so vague in their terms that reasonably intelligent persons would differ as

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[19]Apparently it is the case that the State of Texas, or rather the Texas Railroad Commission, has in fact sent a letter to the Secretary of Energy explicitly rejecting the delegation. The Secretary has not yet, however, rescinded the delegation.

to their meaning and application, then they have failed to establish a vagueness claim under the Fifth Amendment. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The petitioners claim that they are uncertain as to how they must comply with the prohibitions in Section 402 regarding distribution of gas to residential customers. In our opinion the claim is not ripe. There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has or will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule. Presumably, a state could without overstepping its powers to establish exemption criteria under the federal regulation concerning delegation, exempt all pre-promulgation violators, thus leaving parties such as the petitioners in this case with no injury in fact. The contingent nature of the petitioners' due process claim is of a sort that courts have in the past avoided until another day. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 85-90, 67 S.Ct. 556, 561-65, 91 L.Ed. 754 (1947). So shall we today.

DISMISSED.

APPENDIX B

SELECTED PROVISIONS OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978

42 U.S.C. § 8301 *et. seq.* (Supp. IV 1980)

As amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981)

SUBCHAPTER I—GENERAL PROVISIONS

§ 8301. Findings; statement of purposes

(a) Findings.—The Congress finds that—

(1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; and

(2) the purposes of this chapter are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy sources in lieu of natural gas or petroleum.

(b) Statement of purposes.—The purpose of this chapter, which shall be carried out in a manner consistent with applicable environmental requirements, are—

(1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;

(2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this chapter, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions or States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present and future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this chapter comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this chapter by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve

natural gas and petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilizer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

§ 8302. Definitions

(a) **Generally.**—Unless otherwise expressly provided, for the purposes of this chapter—

(1) The term "Secretary" means the Secretary of Energy.

(2) The term "person" means any (A) individual, corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company, (B) any State, the District of Columbia, Puerto Rico, and any territory or possession of the United States, or (C) any agency or instrumentality (including any municipality) thereof.

* * *

§ 8372. Prohibition on use of natural gas for decorative outdoor lighting

(a) Prohibition on installation of new outdoor lighting

Effective beginning on November 9, 1978, no local distribution company, or any industrial user of natural gas who obtains such gas under a contract between such user and a natural gas pipeline, or any agent thereof, shall install any outdoor lighting fixture using natural gas.

(b) Prohibition on selling natural gas to be used in outdoor lighting. (1) Not later than 180 days after the date of the enactment of this Act [enacted Nov. 9, 1978], the Secretary shall, by rule, prohibit any local distribution company (unless an exemption has been obtained under subsection (c)) from providing natural gas service for use in outdoor lighting (other than any outdoor lighting fixture which was installed before the date of the enactment of this Act [enacted Nov. 9, 1978] in connection with a residence and for which natural gas was being provided on such date of enactment [enacted No, 9, 1978])—

(A) effective on the date such final rule is issued, in the case of any residential, commercial, or industrial customer unless a later effective date is applicable under subparagraph (B) or (C) of this paragraph;

(B) effective beginning 180 days after the date such final rule is issued, in the case of any industrial or commercial structure for which natural gas was being provided by such company for outdoor lighting use on November 9, 1978; and

(C) effective beginning January 1, 1982, in the case of any municipal outdoor lighting fixture for which natural gas was being provided by such company for outdoor lighting use on the date of the enactment of this Act [enacted Nov. 9, 1978].

(2) The rule prescribed under paragraph (1) shall provide that any industrial user of natural gas who obtains such natural gas under a contract between such user and a natural gas pipeline shall be prohibited from using such natural gas for outdoor lighting (unless an exemption has been obtained under subsection (c) of this section)—

(A) effective 180 days after the date such final rule takes effect, if the industrial user was using natural gas for outdoor lighting on November 9, 1978; or

(B) beginning on the date such final rule takes effect, if such industrial user was not so using natural gas on such date.

(c) Exemptions

(1) The Secretary shall, by order—

(A) exempt from the prohibition under subsection (a) of this section the installation of a replacement lighting fixture for any memorial light or light of historical significance, and

(B) permanently exempt from a prohibition under subsection (b) of this section the use[1] natural gas in any memorial light or light of historical significance.[2]

If a petition for such exemption is made by a Federal, State, or local government agency or by any appropriate historical association.

(2) The Secretary shall, by order—

(A) exempt from the prohibition under subsection (a) of this section, upon a petition therefor, the installation of a replacement lighting fixture for any natural gas outdoor lighting, and

(B) permanently exempt from a prohibition under subsection (b) of this section, upon a petition therfor, use of natural gas for outdoor lighting,

which is used for commercial purposes, which is of a traditional nature, and which conforms with the cultural or architectural style of the area in which such light is located.

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[1]So in original. Probably should be "use of".

[2]So in original. Period should probably be a comma.

(3) The Secretary shall by order, exempt any local distrubtion company or industrial user described in subsection (b)(2) of this section, from the rule required to be prescribed under subsection (b) of this section concerning the continuation of such service in effect on November 9, 1978, upon the filing of a petition therefor by such pipeline or company, or by any other interested person. Such exemption shall be for such period as, and to the extent that, the Secretary finds—

(A) such exemption is necessary to protect the safety of persons or property;

(B) such exemption is necessary to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) exists on November 9, 1978;

(C) compliance with such rule would entail substantial expense and would not be cost justified; or

(D) the issuance of the exemption is in the public interest and is consistent with the purposes of this chapter.

(4) Determinations on any petition for an exemption under this section shall be made under criteria which the Secretary shall establish by rule, which rule shall be prescribed not later than 180 days after the effective date of this chapter.

(d) Procedures

Rules and orders under this section shall be made in accordance with the provisions of section 553 of title 5, except that determinations on any petition for exemption under this section shall be made only after interested persons have been afforded an opportunity for a public hearing. Under rules prescribed by the Secretary, the Secretary may stay the application of any prohibition under subsection (b) of this section applicable to any person pending the resolution of any petition for an exemption for such person.

(e) Authority may be delegated to States

(1) Under regulations prescribed by the Secretary, the responsibility and authority of the Secretary with regard to outdoor lighting under this section may be delegated to the appropriate regulatory authority of a State if he determines that such delegation would be consistent with the purposes of this section.

(2) Any delegation under paragraph (1) shall be on terms and conditions prescribed by the Secretary and may be rescinded by the Secretary at any time by notifying the State authority of such rescission.

(3) Any State authority to which the Secretary has delegated authority under this subsection shall prepare and transmit reports to the Secretary on a periodic basis (as determined by the Secretary) on actions taken to carry out the purposes of this section.

(f) Information as to cost of gas lighting. (1) For the purpose of discouraging the use of natural gas for outdoor lighting, each local distribution company which is subject to subsection (a) or (b) shall, in accordance with rules promulgated by the Secretary—

(a) establish a reasonable and simple method, as determined by each such company, by which the company shall periodically inform its customers about the amount of natural gas consumed by outdoor lighting and the annual cost of such gas for such lighting; and

(B) by report to the Secretary the method established under subparagraph (A).

A company may establish a method which provides for reporting such information on the basis of estimates where actual information is not readily available.

(2) The Secretary shall propose the rules referred to in paragraph (1) as promptly as possible after the date of the enactment of this subsection [enacted Aug. 13, 1981], and such rules shall take effect not later than the

ninetieth day after they are proposed. In promulgating such rules, the Secretary shall, to the greatest extent feasible, consult with the appropriate regulatory authority of the States and the local distribution companies who will be subject to the rules.

(g) Definitions. As used in this section—

(1) The term "outdoor lighting" means lighting by any stationary source which is not located inside any building.

(2) The term "pipeline company" means any person engaged in the business of transporting natural gas by pipeline other than as a local distribution company.

(3) The term "local distribution company" means any person engaged in the business of transportation and local distribution of natural gas and the sale of natural gas for ultimate consumption.

(4) The term "residence" means any single or multiple family dwelling unit, including commonly held areas associated with any such unit.

(As amended Aug. 13, 1981, P.L. 97-35, Title X, Subtitle B, § 1024, 95 Stat. 617).

PART A — PROCEDURES

* * *

§8412 Judicial Review

(c) Judicial Review — (1) Any person aggrieved by any final rule or order [prescribed by the Secretary imposing a prohibition or granting an exemption] ... may at anytime before the 60th day after the date such rule, order, or denial is published ... file a petition with the United States Court of Appeals for the Circuit wherein such person resides, or has his principle place of business, for review thereof.

* * *

PART C — ENFORCEMENT

§ 8431. Notice of violation; other general provisions

(a) Notice of violation.—(1) Whenever, on the basis of any information available, the Secretary finds that any person is in violation of any provision of this chapter, or any rule or order thereunder, the Secretary shall issue notice of such violation. Any notice issued under this subsection shall be in writing and shall state with reasonable specificity the nature of the violation.

(2) Paragraph (1) shall not be construed to relieve any person of liability under the other provisions of this chapter for any act or omission occuring before the issuance of notice.

(b) Individual liability of corporate personnel.—Any individual director, officer, or agent of a corporation who willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of this chapter, or any rule or order thereunder, shall be subject to penalties under this section without regard to any penalties to which the corporation may be subject, except that no such individual director, officer, or agent shall be subject to imprisonment under section 8432 of this title, unless he also knew of noncompliance by the corporation or had received from the Secretary notice of noncompliance by the corporation.

§ 8433. Civil penalties

(a) General civil penalty.—Any person who violates any provision of this chapter (other than section 8372 of this title), or rule or order thereunder, shall be subject to a civil penalty, which shall be assessed by the Secretary, of not more than $25,000 for each violation. Each day of violation shall constitute a separate violation.

* * *

(c) Penalties for violation of section 8372 of this title.— (1) Any person who violates any prohibition under subsection (b) (1) of section 8372 of this title with respect to providing of natural gas service to any person for use in outdoor lighting shall be subject to a civil penalty, which shall be assessed by the Secretary and which shall not exceed $500 for each outdoor lighting fixture involved.

(2) Any industrial user who violates prohibition under subsection (b) (2) of section 8372 of this title shall be subject to a civil penalty, which shall be assessed by the Secretary and which shall not exceed $500 per day of violation for each outdoor lighting fixture involved which was used by an industrial customer, but not to exceed $5,000 per outdoor lighting fixture involved.

(3) The penalties under this subsection shall only apply in the case of a violation by any person who at the time of the violation had knowledge or reasonably should have had knowledge that the action involved was prohibited under section 8372 of this title.

§ 8434. Injuctions and other equitable relief

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of this chapter, or any rule or order thereunder, a civil action, may be brought, in accordance with section 7192(c) of this title, in the appropriate district court of the United States to enjoin such acts or practices, and, upon a proper showing, the court shall grant, without bond, mandatory or prohibitive injunctive relief, including interim equitable relief.

§ 8435. Citizens suits

(a) General rule.—Except as otherwise provided in subsection (b) of this section, any aggrieved person may commence a civil action for mandatory or prohibitive injunctive relief, including interim equitable relief, against the Secretary or the head of any Federal agency which has a responsibility under this chapter if there is an alleged failure of the Secretary or such agency head to perform any act or duty under this chapter which is not discretionary. The United States district courts shall have jurisdiction over actions brought under this section, without regard to the amount in controversy or the citizenship of the parties.

(b) Notice to Secretary or agency head.—No action may be commenced under subsection (a) of this section before the 60th calendar day after the date on which the plaintiff has given notice of such action to the Secretary or the agency head involved. Notice under this subsection shall be given in such manner as the Secretary shall prescribe by rule.

APPENDIX C

REGULATIONS ISSUED BY THE DEPARTMENT OF ENERGY UNDER SECTION 402 OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT

10 C.F.R. §§ 516.10 *et seq.*, as amended,
47 Fed. Reg. 23436-23439 (May 28, 1982)

PART 516—PROHIBITION ON SALE AND DIRECT INDUSTRIAL USE OF NATURAL GAS FOR OUTDOOR LIGHTING

Subpart A—General Purpose and Scope; Definitions

Sec.
516.10 General purpose and scope.
516.11 Definitions

Subpart B—Prohibitions

516.20 General prohibition on installation of natural gas outdoor lighting fixtures.
516.21 General prohibition on sale of natural gas for use in outdoor lighting.

Sec.
516.22 Prohibition on use of natural gas by direct industrial customers for outdoor lighting.

Subpart C—Delegation of Authority

516.30 Scope
516.31 Annual reports.
516.32 Rescission.

Subpart D—Guidance on Exemptions

516.40 Applicability.
516.41 Lighting of historical significance.
516.42 Memorial lighting.
516.43 Commercial lighting of a traditional nature.
516.44 Safety of persons and property.
516.45 Time to install substitute lighting.
516.46 Compliance which entails substantial expense and would not be cost justified.
516.47 Public interest.

AUTHORITY: Sec. 402, Pub. L. 95-620; 92 Stat. 3315; 42 U.S.C. 8372.

SOURCE: 44 FR 27607, May 10, 1979, unless otherwise noted.

Subpart A—General Purpose and Scope; Definitions

§516.10 General purpose and scope.

(a) The purpose of this rule is to implement section 402 of Pub. L. 95-620, the Powerplant and Industrial Fuel Use Act of 1978 (the Act). The objective of section 402 of the Act is to eliminate the nonessential use of natural gas for outdoor lighting and to conserve such gas for the benefit of present and future generations.

(b) The rule consists of four subparts. Subpart A consists of this subsection, entitled "General Purpose and Scope," and § 516.11, "Definitions."

(c) Subpart B contains the prohibitions on the installation of natural gas outdoor lighting fixtures and the sale and direct industrial use of natural gas for outdoor lighting. Section 516.20 prohibits the installation of natural gas outdoor lighting fixtures. Sections 516.21 and 516.22 prohibit local distribution companies from providing natural gas to residential, commercial, and industrial customers for use in outdoor lighting as well as prohibiting the use of natural gas by direct industrial customers for outdoor lighting.

(d) Subpart C delegates to the appropriate State regulatory authorities the responsibility and authority of the Secretary of DOE with regard to natural gas outdoor lighting. The specific authorities delegated are set forth in § 516.330. Section 516.31 sets forth the requirements for annual reports which the appropriate State regulatory authorities are required to submit to ERA. Section 516.32 provides for rescission, by ERA, of the delegation of authority as it applies to any particular State.

(e) Subpart D sets forth guidance to be followed by the appropriate State regulatory authorities in granting or denying requests for exemption in the absence of the

exercise of authority by the State in promulgating its own criteria. Criteria for granting or denying exemptions are provided for each of the categories of exemption established by the Act: Lighting of historical significance (§ 516.41); memorial lighting (§ 516.42); commercial lighting of historical significance (§ 516.43); safety of persons and property (§ 516.44); time to install substitute lighting (§ 516.45); substantial expense (§ 516.46); public interest (§ 516.47).

§ 516.11 Definitions

Unless otherwise expressly provided, for the purposes of this rule:

(a) The term "direct industrial customer" means an industrial user of natural gas who obtains the natural gas under a contract with a natural gas pipeline company, or any agent thereof.

(b) The term "local distribution company" means any person engaged in the business of interstate or intrastate transportation and local distribution of natural gas for ultimate consumption.

(c) The term "natural gas" means any fuel consisting in whole or in part of natural gas, liquid petroleum gas, or synthetic gas derived from petroleum or natural gas liquids.

(d) The term "natural gas outdoor lighting fixture" means a complete stationary natural gas outdoor lighting unit.

(e) The term "pipeline company" means any person engaged in the business of interstate or intrastate transportation of natural gas by pipeline other than as a local distribution company.

(f) The term "residence" means any single or multiple family dwelling unit, including commonly held areas associated with such unit and including multiple family dwelling units which may be classified by the local distribution company as "commerical" customers.

(g) Unless otherwise designated by ERA, upon recommendation of the Governor, the term "State regulatory authority" means that agency of any of the 50 States, the District of Columbia, Puerto Rico, or any territory or possession of the United States, which has primary or exclusive authority to fix, modify or approve rates for the sale of natural gas by local distribution companies within that State, except that:

(1) In the case of a local distribution company which is publicly-owned, and not subject to State rate regulation, references in this part to "State regulatory authority" or "State" shall be treated as references to such company; and

(2) In the case of any direct industrial customer or any local distribution company which is privately-owned, and not subject to State rate regulation, the Governor shall designate the responsible State regulatory authority.

(h) The term "substitute lighting" mean outdoor lighting which does not directly burn natural gas.

(i) The term "residential outdoor lighting fixture" means a natural gas outdoor lighting fixture which was installed prior to, and was in service in connection with a residence on November 9, 1978.

[44 FR 27607, May 10, 1979, as amended at 45 FR 35208, May 23, 1980]

Subpart B—Prohibitions

§ 516.20 General prohibition on installation of natural gas outdoor lighting fixtures.

(a) *Prohibition.* No local distribution company or direct industrial customer shall install any natural gas outdoor lighting fixture.

(b) *Effective date.* The prohibition stated in paragraph (a) of this section shall be effective beginning on November 9, 978.

§516.21 General prohibition on sale of natural gas for use in outdoor lighting.

(a) *Prohibition.* No local distribution company shall supply natural gas for use in any outdoor lighting fixture except for residential outdoor lighting fixtures, as that term is defined in §516.11(i).

(b) *Effective dates.* The prohibition stated in paragraph (a) of this section shall be effective on the following dates:

(1) For any industrial or commercial fixture to which natural gas was supplied for outdoor lighting use on November 9, 1978, *November 5, 1979.*

(2) For any municipal outdoor lighting fixture to which natural gas was for outdoor lighting use on November 9, 1978, *January 1, 1982.*

§516.22 Prohibition on use of natural gas by direct industrial customers for outdoor lighting.

(a) *Prohibition.* No direct industrial customer shall use natural gas for outdoor lighting.

(b) *Effective dates.* (1) In the case of a direct industrial customer who was using natural gas for outdoor lighting on November 9, 1978, the prohibition stated in paragraph (a) of this section shall be effective on November 5, 1979.

(2) In the case of a direct industrial customer using a natural gas outdoor lighting fixture(s) that:

(i) Was installed prior to the ban on the installation of such fixture(s) set out in § 516.20 of this rule; and

(ii) Was not using natural gas for such fixture(s) on the date this rule is issued as a final rule.

The prohibition stated in paragraph (a) of this section shall be effective on May 8, 1979.

Subpart C—Delegation of Authority

§ 516.30 Scope.

Pursuant to section 402(e) of the Act, ERA delegates to the appropriate state regulatory authorities, effective on the date this rule is issued as a final rule, the full responsibility and authority of the Secretary of Energy with regard to natural gas outdoor lighting. The authorities and responsibilities delegated by this rule to the appropriate state regulatory authorities acceptance of which is at the states' discretion, are those enumerated in paragraphs (a) through (h) of this section. The appropriate State regulatory authorities should normally consult with the State Historic Preservation Officers for their respective States (as recognized by the U.S. Department of Interior, Heritage Conservation and Recreation Service) when fulfilling their responsiblities and authorities as set forth in this section particularly when decisions are made or options considered relating to historic preservation.

(a) *Authority to promulgate regulations.* The authority to promulgate any regulations necessary to carry out the purposes of section 402 of the Act is delegated to the appropriate State regulatory authorities.

(b) *Authority to issue orders.* The authority to issue orders exempting certain natural gas outdoor lighting fixtures from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorites. Such exemption orders may be issued on the basis of:

(1) Lighting of historical significance;
(2) Memorial lighting;

(3) Commercial lighting of historical significance;

(4) Lighting which is necessary to protect the safety of persons and property;

(5) The necessity to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) existed on November 9, 1978;

(6) Substantial expense which would not be cost justified; or

(7) The public interest and consistency with the purposes of the Act.

(c) *Authority to establish exemption criteria.* The authority to establish criteria to be used in making any determinations to issue any orders relating to exemptions from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(d) *Authority to establish exemption procedures.* The authority to establish procedures for the acceptance processing, consideration, and grant or denial of applications and requests for exemptions from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(e) *Authority to establish enforcement mechanisms.* The authority to establish enforcement policies, criteria and procedures with respect to the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(f) *Authority to enforce prohibitions and assess civil penalties.* The authority to enforce prohibitions set forth in Subpart B of the rule, including the authority to assess civil penalties for noncompliance with such prohibitions pursuant to section 723(c) of the Act, is delegated to the appropriate State regulatory authorities.

(g) *Authority to investigate.* The authority to initiate investigations and compel the submission of data or

relevant documents is delegated to the appropriate State regulatory authorities.

(h) *Authority to receive customer notification reports.* The authority to receive reports concerning the method selected by local distribution companies for periodic notification of their customers under §§516.52.

§ 516.31 Annual reports.

(a) *General requirements.* Pursuant to this delegation, the appropriate State regulatory authority shall submit to ERA two copies of the annual report as specified in this section. The annual report shall be submitted to: Economic Regulatory Administration, U.S. Department of Energy, Office of Utility Systems, 2000 M Street, NW., Washington, D.C. 20461, Attention: Gas Light Prohibitions.

(b) *Schedule for submission.* The appropriate State regulatory authority shall submit annually to ERA, by January 1 of each year, beginning no later than January 1, 1980, a report as specified in this section, except as provided for in paragraph (d) of this section. The last annual report shall be submitted by January 1, 1984. The appropriate State regulatory authority shall submit the annual report either separately or together with the "PURPA Annual Report on Gas Utilities" required to be submitted to DOE by November 1 of each year pursuant to requirements established by section 309 of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117 (Pub. L. 94-617).

(c) *Contents of report.* (1) The first annual report shall contain all of the elements specified in paragraph (2) of this paragraph (c). Subsequent reports shall contain only those elements or portions of elements to which there were significant changes since the last annual report was submitted.

(2) The appropriate State regulatory authority shall include in their report the following elements:

(i) A list of all local distribution companies and all

direct industrial customers who use natural gas for outdoor lighting covered by the report;

(ii) Current estimated annual natural gas consumption for the local distribution companies and all direct industrial customers covered by the report attributable to outdoor lighting;

(iii) Copies of all State statutes, rules and regulations prohibiting natural gas lighting, enforcing the prohibitions, and granting or denying exemptions to the prohibitions;

(iv) A summary of exemption requests granted or denied, by category of exemption, and including the rationale for such grant or denial; and

(v) A description of the State's current or projected efforts to enforce the prohibitions set forth in Subpart B of this rule.

(d) *Optional certification of submission of final report.* An appropriate State regulatory authority may submit to ERA a certification stating that, to the best knowledge of such authority, further annual reports are unnecessary, stating the rationale for such determination. The certification must be submitted prior to the date on which the annual report is due. ERA shall be the sole determinant, however, as to whether or not annual reports are required.

§ 516.32 Recission.

This delegation as it applies to any particular State may be rescinded by ERA if, after notice and opportunity for a hearing, ERA finds that the State regulatory authoirty has failed to comply with any substantial provision of section 402 of the Act or this rule. Such finding and rescission shall be published in the FEDERAL REGISTER, and shall become effective no sooner than 15 days after the date of publication.

Subpart D—Guidance on Exemptions

§ 516.40 Applicability.

The appropriate State regulatory authority shall grant or deny a request for exemption on the basis of the

guidance specified in this subpart until such time as the appropriate State regulatory authority chooses to exercise the authority to establish exemption criteria, delegated by § 516.30(c) of this rule.

§ 516.41 Lighting of historical significance.

(a) *Scope.* A Federal, State or local government agency, or an appropriate historical association, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§ 516.20 and 516.21 of this rule for any property on the basis of historical significance. In the case of a petition for an exemption from the prohibition set forth in § 516.20 of this rule (General prohibition on installation of natural gas outdoor lighting fixtures), an exemption shall be granted only for replacement of a natural gas outdoor lighting fixture(s) that was installed prior to November 9, 1978. Such replacement shall include:

(1) Replacement of an extant original or reporduction fixture; or

(2) Installation of an original or reproduction fixture to replace a fixture which existed during the life of the specified historic property.

(b) *Criteria.* The criteria for an exemption on the basis of historic significance shall be satisfied upon certification, by the petitioner, that the specifically identified natural gas outdoor lighting fixture(s) directly contributes to the quality of significance of the specifically identified historic property or district, as applicable; and upon a finding that the specifically identified historic property:

(1) Is listed on the National Register of Historic Places maintained by the Heritage Conservation and Recreation Service, Department of Interior, or is officially determined eligible for listing by the Secretary of Interior, pursuant to the National Historic Preservation Act (16 U.S.C. 470 as amended), applicable regulations (36 CFR Parts 60 and 63), and Executive Order 11593; or

(2) Is in a district whose State or local statutes are certified as providing adequate protection of historic places by the Secretary of the Department of Interior, pursuant to the Tax Reform Act of 1976 (26 U.S.C. 191, 280B) and applicable regulations.

(c) *Stays.* An exemption request shall result in a stay from the prohibitions set forth in Subpart B of this rule if:

(1) The petitioner has certified that the specifically identified natural gas outdoor lighting fixture(s) directly contributes to the quality of significance of the specifically identified historic property or district, as applicable; and

(2) An application is pending, before the Department of Interior, for inclusion in one of the categories specified in paragraph (b)(1) or (2) of this section.

§ 516.42 Memorial lighting.

(a) *Scope.* A Federal, State or local government agency, or an appropriate historical association, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§516.20 and 516.21 of this rule on the basis of memorial lighting. In the case of a petition for an exemption from the prohibition set forth in § 516.20 of this rule (General prohibition on installation of natural gas for outdoor lighting fixtures), an exemption shall be granted only for replacement of a natural gas outdoor lighting fixture(s) that was installed prior to November 9, 1978. Such replacement shall include replacement of an extant fixture only.

(b) *Criteria.* The criteria for an exemption on the basis of memorial lighting shall be satisfied upon a finding that the specifically identified outdoor lighting fixture(s) directly contributed to preserving the memory of a deceased person or persons.

§ 516.43 Commercial lighting of a traditional nature.

(a) *Scope.* A person using natural gas for outdoor lighting which is used for commercial purposes and which is of a traditional nature and conforms with the cultural or architectural style of the area in which it is located, may petition for an exemption from the prohibitions set forth in §§ 516.20 and 516.21 of this rule. In the case of a petition for an exemption from the general prohibition on installation of natural gas outdoor lighting fixtures (§ 516.20), an exemption shall be granted only to replace a natural gas outdoor lighting fixture(s) which had been installed prior to November 9, 1978. Such replacement shall include:

(1) replacement of an existing natural gas light; or

(2) replacement of a natural gas light which does not presently exist but which existed at some previous time upon the specified property.

(b) *Criteria.* The criteria for an exemption on the basis of commercial lighting of a traditional nature shall be satisfied upon certification by the petitioner that the specifically identified natural gas outdoor lighting fixture(s), which is used for commercial purposes and which is of a traditional nature and conforms with the cultural or architectural style of the area in which such light is located, presently exists or will be used to replace a natural gas lighting fixture of a traditional nature.

(c) *Stays.* An exemption request shall result in a stay from the prohibitions set forth inSubpart B of this rule if the petitioner has certified that the specifically identified natural gas outdoor lighting fixture(s) used for commercial purposes:

(1) Is of a traditional nature and conforms with the cultural or architectural style of the area in which such light(s) is located, and

(2) Presently exists or will be used to replace a natural gas lighting fixture of a traditional nature.

[45 FR 35208, May 23, 1980]

§ 616.44 Safety of persons and property.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§516.21 and 516.22 of this rule on the basis of the necessity to protect the safety of persons and property if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of necessity to protect the safety of persons and property shall be satisfied upon a demonstration that an exemption for the natural gas fixture(s) is essential:

(1) To prevent an increase in the likelihood of bodily injury or damage to property;

(2) To prevent an increase in the likelihood of the occurrence of crime in the location served by the light; or

(3) Because other existing lighting in the location does not provide lighting adequate to insure confirmance with American National Standards Institute (ANSI) Standard No. D 12.1, "The American, National Standard Practice for Roadway Lighting."

[44 FR 27607, May 10, 1979, as amended at 45 FR 35209, May 23, 1980]

§ 516.45 Time to install substitute lighting.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for a temporary exemption from the prohibitions set forth in §§ 516.21 and 516.22 of this rule. Such an exemption shall be on the basis of the time needed to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) exists, if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of time to install substitute lighting shall be satisfied upon a finding that:

(1) No adequate outdoor lighting (other than that using natural gas) is available at the time the applicable prohibition became effective; and

(2) The time required for installation of the substitute lighting will not extend beyond one year from the date the applicable prohibition became effective, unless facts and circumstances warrant a longer period.

§ 516.46 Compliance which entails substantial expense and would not be cost justified.

(a) *Scope.* A local distribution company, a direct industrial customer, an individual user or an interested person may petition for an exemption from the prohibitions set forth in §§ 516.21 and 516.22 of this rule on the basis that compliance with the prohibitions entails substantial expense and would not be cost justified, if the natural gas at issue was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of substantial expense shall be satisfied upon a showing by the petitioner that compliance with the prohibitions in § 516.21 or § 516.22 of this rule would:

(1) Entail substantial expense; and

(2) That such expense would outweigh the benefits to be derived from compliance.

[45 FR 35209, May 23, 1980]

§ 516.47 Public Interest.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in

§§ 516.21 and 516.22 of this rule on the basis of the public interest and consistency with the purposes of this Act, if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of the public interest and consistency with the purposes of the Act shall be satisfied upon a finding that converting a specific natural gas outdoor lighting fixture(s) to substitute lighting would not reduce the use of natural gas.

Subpart E—Outdoor Natural Gas Lights—Customer Notification; Reporting Procedures

§516.51 Notification of amount and annual cost of natural gas used in outdoor lights.

(a) Each local distribution company subject to the prohibitions of section 402 (a) and (b) of FUA which has natural gas outdoor lighting fixtures attached to its system shall:

(1) No later than May 31, 1982, select a method for periodically informing its customers of the amount of natural gas used by a typical natural gas outdoor lighting fixture in the company's system, as determined by the company, and the annual cost of the natural gas so used; and

(2) Within one year from the date on which the notification method is reported to the appropriate state regulatory authorities in accordance with § 516.52, give the initial customer notification, using the method so selected. The notification shall thereafter be given annually.

(3) Any local distribution company which experiences difficulty in selecting its customer notification method may obtain a reasonable extension of the May 31, 1982 deadline from the appropriate State regulatory authority upon the showing of good cause.

(b) The method to be used in the customer

notification required by paragraph (a) of this section, shall be selected by each affected local distribution company, and shall be reasonable and simple, as viewed in the context of the company's routing operating procedures.

§516.52 Customer notification reports.

(a) No later than May 31, 1982, each local distribution company required to give customer notification under § 516.51(a), shall report the method selected to the state regulatory authority designated by the governor to administer the outdoor natural gas lighting program for the area in which the distributor is located, under the delegation of authority in Subpart C of this part.

(b) No later than May 31, 1982, each local distribution company not required to give customer notification under § 516.51(a) by reason of the fact that it has no natural gas outdoor lighting fixtures attached to its system shall report this fact to the State regulatory authority designated by the governor to administer the outdoor natural gas lighting program for the area in which the distributor is located, under the delegation of authority in Subpart C of this part.

(c) Local distributing companies given extensions in the May 31, 1982 deadline for selection of a customer notification method under § 516.51(a)(3), above, shall report the method selected to their State regulatory authority in accordance with the terms of such extension.